

No. 15892

United States
Court of Appeals
for the Ninth Circuit

M. H. SHERMAN COMPANY, a Corporation,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

MAR 12 1958

PAUL P. O'BRIEN: CLERK

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District of Arizona

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ATTORNEYS OF RECORD

GUST, ROSENFELD, DIVELBESS & ROBIN-
ETTE,

FRANK E. FLYNN,
Security Building,
Phoenix, Arizona,

Attorneys for Appellant.

JACK D. H. HAYS,
United States Attorney;

WILLIAM A. HOLOHAN,
Assistant United States Attorney,
United States Courthouse,
Phoenix, Arizona,

Attorneys for Appellee.

United States District Court for the
District of Arizona

Civ-2078 Phx.

M. H. SHERMAN COMPANY, a Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, a Body
Politie, Corporate, and Sovereign,
Defendant.

COMPLAINT

The Plaintiff Complains of the Defendant and
for Cause of Action Alleges:

I.

That the Plaintiff is now and at all times herein
mentioned has been a corporation, organized and ex-
isting under and by virtue of the laws of the State
of California.

II.

That Defendant is now and at all times herein
mentioned has been a body politic, corporate and
sovereign.

III.

That the Plaintiff is now and at all times herein
mentioned has been the owner in fee of the following
described real property situated in the County of
Maricopa, State of Arizona, to wit:

That part of the West Half ($W\frac{1}{2}$) Section
Thirty-four (34), Township Two North (T2N),

Range Four East (R4E), Gila and Salt River Base and Meridian, lying West of the cross-cut canal Except a parcel approximately 150 feet by 150 feet in the Northwest corner thereof, Maricopa County, Arizona, containing approximately 175 acres of unimproved Desert Land.

IV.

That on or about the 16th day of May, 1943, said Plaintiff and said Defendant entered into a written lease dated the 16th day of May, 1943, whereby the said Plaintiff, as Lessor, leased to the said Defendant, as Lessee, to be used by the lessee for the requirements of the War Department, said real property for the period beginning with the 16th day of May, 1943, and ending with the 30th day of June, 1943, with the provision that said lease at the option of the Lessee be renewed from year to year and, by supplemental written agreement dated June 23, 1943, made between said Lessor and said Lessee, the term of said lease was extended for the period beginning July 1, 1943, through June 30, 1944, with the provision that unless and until Lessee shall give to Lessor 30 days advance written notice of cancellation of said lease, the said lease shall remain in force thereafter from year to year without further notice and with the further provision that said lease shall in no event extend beyond six months from the date of the termination of the unlimited national emergency as was declared by the President of the United States on May 27, 1941 (Proclamation 2487), and that the term of said lease expired on October 27, 1952, as a result of Presiden-

tial Proclamation No. 2974 of April 28, 1952, terminating such unlimited national emergency, and the expiration of six months thereafter.

V.

That upon the execution of said lease, the defendant entered into the possession and occupancy of said premises and established thereon a military camp for the quartering of soldiers and for other military activities, and erected thereon many wooden barracks, bath houses, latrines, and other accessories and other appurtenant buildings, with concrete foundations, floors, slabs, platforms and other appurtenances, and other concrete structures, or parts of structures, and underground pipes, a concrete swimming pool and a tennis court with a hard-surface pavement, and the Defendant at the termination of said lease failed and refused, and still fails and refuses, although demand has been made upon it so to do, to remove from said premises the concrete of the said floors, foundations, slabs, platforms, swimming pool, and other structures and appurtenances and the said pipes and the hard surface of said pavement of said tennis court, and has thereby committed waste on said premises to the great injury and damage of the said premises and of Plaintiff's reversionary interest, estate and inheritance in said premises and to the injury and damage of the Plaintiff in the sum of Forty Thousand Dollars (\$40,000.00), which is the reasonable cost of the excavation and removal from said premises of all thereof.

Wherefore, Plaintiff prays for judgment against said Defendant as follows:

1. For the said sum of Forty Thousand Dollars (\$40,000.00).
2. For Plaintiff's costs and disbursements herein.
3. For such other and further relief as to the Court shall seem proper.

GUST, ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ IVAN ROBINETTE,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed October 5, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now Comes United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and Everett L. Gordon, Assistant United States Attorney for said District, and moves that the above-entitled cause be dismissed upon the ground of lack of jurisdiction.

JACK D. H. HAYS,
United States Attorney
for the District of Arizona.

/s/ EVERETT L. GORDON,
Assistant U. S. Attorney.

This Motion is based on the provisions of Title 28 U.S.C. 1346, which sets forth the jurisdiction of the District Court with regard to the United States as a defendant. Pursuant to sub-paragraph a(2) of the afore-cited section, it is stated that the United States District Court has jurisdiction of claims against the United States not exceeding \$10,000.00 in amount.

As the Court well knows, a sovereign can only be sued if it consents to suit, and then such actions must be brought under the strict letter of the statute.

Respectfully submitted,

JACK D. H. HAYS,

United States Attorney for the District of Arizona,
and

EVERETT L. GORDON,

Assistant U. S. Attorney;

By /s/ WILLIAM A. HOLOHAN,

Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed December 17, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY

OCTOBER 10, 1955

Honorable Dave W. Ling, United States District Judge, Presiding.

Government's Motion to Dismiss comes on regularly for hearing this day. No appearance is made for the plaintiff. Everett Gordon, Esq., Assistant United States Attorney, is present for the defendant. Said motion is now argued.

It Is Ordered that Government's Motion to Dismiss is granted and that plaintiff is allowed 20 days to file amended complaint.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now M. H. Sherman Company, a corporation, plaintiff, and for its Amended Complaint against the defendant, The United States of America, complains and alleges:

I.

That the plaintiff is now and at all times herein mentioned has been a corporation, organized and existing under and by virtue of the laws of the State of California, and duly qualified to do business in the State of Arizona.

That defendant is now and at all times herein mentioned has been a body politic, corporate and sovereign.

II.

That this action and the tort claim for which the plaintiff sues arises under Title 28, United States Code, Section 1346(b), as hereinafter more fully appears.

III.

That the plaintiff is now and at all times herein mentioned has been the owner in fee of the following described real property situated in the County of Maricopa, State of Arizona, to wit:

That part of the West Half ($W\frac{1}{2}$) Section Thirty-four (34), Township Two North (T2N), Range Four East (R4E), Gila and Salt River Base and Meridian, lying West of the crosscut canal Except a parcel approximately 150 feet by 150 feet in the Northwest corner thereof, Maricopa County, Arizona, containing approximately 175 acres.

IV.

That on or about the 16th day of May, 1943, said plaintiff and said defendant entered into a written lease dated the 16th day of May, 1943, whereby the said plaintiff, as lessor, leased to the said defendant, as lessee, to be used by the lessee for the requirements of the War Department, said real property above described for the period beginning with the 16th day of May, 1943, and ending with the 30th day of June, 1943, with the provision that said lease at

the option of the Lessee be renewed from year to year and, by supplemental written agreement dated June 23, 1943, made between said lessor and said lessee, the term of said lease was extended for the period beginning July 1, 1943, through June 30, 1944, with the provision that unless and until lessee should give to lessor thirty (30) days advance written notice of cancellation of said lease, the said lease should remain in force thereafter from year to year without further notice and with the further provision that said lease should in no event extend beyond six months from the date of the termination of the unlimited national emergency as was declared by the President of the United States on May 27, 1941 (Proclamation 2487), and that the term of said lease expired on October 27, 1952, as a result of Presidential Proclamation No. 2974 of April 28, 1952, terminating such unlimited national emergency, and the expiration of six months thereafter.

V.

That upon the execution of said lease, the defendant entered into the possession and occupancy of said premises and established thereon a military camp for the quartering of soldiers and for other military activities, and erected thereon many wooden barracks, bath houses, latrines, and other accessories and other appurtenant buildings, with concrete foundations, floors, slabs, platforms and other appurtenances, and other concrete structures, or parts of structures, and underground pipes, a concrete swimming pool and a tennis court with a hard sur-

face pavement, and the defendant acting by and through its officers and employees within the scope of their employment at the termination of said lease wrongfully and tortiously failed and refused, and still fails and refuses, although demand has been made upon it so to do, to remove from said premises the concrete of the said floors, foundations, slabs, platforms, swimming pool, and other structures and appurtenances and the said pipes and the pavement of said tennis court, and has thereby committed waste on said premises to the great injury and damage of the said premises and of plaintiff's reversionary interest, estate and inheritance in said premises and to the injury and damage of the plaintiff in the sum of Forty Thousand Dollars (\$40,000.00), which is the reasonable cost of the excavation and removal from said premises of all thereof.

Wherefore, Plaintiff prays for judgment against said defendant as follows:

1. For the said sum of Forty Thousand Dollars (\$40,000.00).
2. For plaintiff's costs and disbursements herein.
3. For such other and further relief as to the Court shall seem proper.

GUST, ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ IVAN ROBINETTE,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 27, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS
AMENDED COMPLAINT

Now Comes the United States of America by Jack D. H. Hays, United States Attorney for the District of Arizona, and Everett L. Gordon, Assistant United States Attorney for said District, and moves, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, that the Court dismiss the Amended Complaint for:

(1) Lack of jurisdiction on the subject matter.

(2) Failure to state a claim upon which relief can be granted.

The grounds for the motion are:

(a) The Court lacks jurisdiction under the Federal Tort Claims Act; and

(b) Plaintiff's real cause of action is based on a written lease and does not sound in tort.

A. photostatic copy of said lease identified as Exhibit A is attached hereto; and Ex. B—copy of letter from Atty. Gen. to the Sec. of the Army, dated Aug. 25, 1954.

JACK D. H. HAYS,
United States Attorney;

/s/ EVERETT L. GORDON,
Assistant U. S. Attorney.

EXHIBIT A

[Exhibit A, Lease, attached to the foregoing is identical to Lease set forth in Plaintiff's Exhibit No. 1 admitted in evidence.]

EXHIBIT B

United States of America
Department of the Army

Washington, 10 January, 1956

I Hereby Certify that the attached letter dated 25 August, 1954, from the Attorney General of the United States to the Secretary of the Army, which pertains to the litigation action entitled M. H. Sherman Company v. The United States of America, Civil No. 2078, United States District Court, District of Arizona, Phoenix Division, is a true copy of a letter on file in the Corps of Engineers. Copies of the stipulations and judgments, together with the evidence of title, inclosed with the original letter are not included.

/s/ W. W. RAGLAND,
Colonel, Corps of Engineers, Assistant Chief of Engineers for Real Estate.

I Hereby Certify that W. W. Ragland, Colonel, Corps of Engineers, who signed the foregoing certifi-

cate, is the Assistant Chief of Engineers for Real Estate, and that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof I, Wilber M. Brucker, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 16th day of January, 1956.

[Seal] /s/ WILBER M. BRUCKER,
Secretary of the Army.

By /s/ JAMES C. COON,
Deputy Administrative Asst.

Office of the Attorney General
Washington, D. C.

[Department of Justice Seal]

August 25, 1954.

Honorable Robert T. Stevens,
Secretary of the Army,
Washington 25, D. C.

My dear Mr. Secretary:

I have examined the evidence of title and transcript of record in the condemnation proceeding entitled United States of America v. 132.44 acres of land in Maricopa County, Arizona, et al., Civil No.

1855 Phoenix in the United States District Court for the District of Arizona, pertaining to the acquisition of Tract No. 2 for use in connection with the Papago Park Site.

The land is more fully described in the complaint.

The certificate of title was prepared by Dean Edgerton, attorney of the Department of the Army, and is satisfactory in form.

By judgment dated December 3, 1953, just compensation for the use of Tract No. 2 for the period beginning October 28, 1952, and ending June 30, 1953, was determined to be the sum of \$3,221.75, and by judgment dated July 14, 1954, just compensation for the annual use of the tract was determined to be the sum of \$4,800.00. The term taken has been extended to June 30, 1955, but compensation for the use of Tract No. 2 has only been deposited for the period ending June 30, 1954. Accordingly, the compensation for the annual use ending June 30, 1955, should be deposited.

The condemnation proceeding has been regularly conducted, the judgment is satisfied for the period ending June 30, 1954, and a term for years beginning October 28, 1952, and ending June 30, 1954, is vested in the United States of America, extendible for yearly periods thereafter until June 30, 1957, at the election of the Secretary of the Army, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines.

Enclosed are certified copies of the stipulations and judgments, together with the evidence of title.

Sincerely yours,

/s/ HERBERT BROWNELL, JR.,
Attorney General.

Affidavit of service by mail attached.

[Endorsed]: Filed January 18, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY, APRIL 13, 1956

Honorable Dave W. Ling, United States District
Judge Presiding.

It Is Ordered that Defendant's Motion to Dismiss
the Amended Complaint is denied.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

United States of America by the United States
Attorney for the District of Arizona in answer to the
Amended Complaint filed herein, alleges as follows:

I.

Defendant admits the allegations in Paragraphs
I, III, IV of the Amended Complaint.

II.

Defendant denies the allegations in Paragraph II of the Amended Complaint.

III.

Defendant denies each and every allegation in Paragraph V of the Amended Complaint, except defendant admits that it entered into possession of the premises under a lease and erected structures and buildings thereon.

First Affirmative Defense

The Amended Complaint fails to state a claim against the defendant upon which relief can be granted.

Second Affirmative Defense

The Court does not have jurisdiction over the subject matter of this action nor of the defendant.

Third Affirmative Defense

The right of action set forth in the Amended Complaint did not accrue within two years preceding the commencement of this action.

Fourth Affirmative Defense

That pursuant to the lease entered into between plaintiff and defendant, and made reference to in Paragraph IV of the Amended Complaint, plaintiff as lessor relieved the defendant as lessee of any and all restoration responsibility resulting from the use of the leased premises.

Fifth Affirmative Defense

That 114 acres of the 175 acres leased to defendant are presently the subject of a condemned use to the defendant for a term of years, said term beginning October 28, 1952, and said proceedings identified as United States of America vs. 132.44 acres of land in the County of Maricopa, State of Arizona; State of Arizona, et al., No. Civ. 1855-Phx.; that defendant is still in possession of said land and entitled to right to possession until June 30, 1957, and restoration costs to the aforesaid 114 acres now held by defendant are and should be part of the condemnation proceedings in No. Civ. 1855-Phx., more fully described above.

Wherefore, defendant prays that plaintiff take nothing by its action and that defendant have judgment and its costs, and such other relief as may seem meet and proper.

JACK D. H. HAYS,
United States Attorney
for the District of Arizona;

/s/ WILLIAM A. HOLOHAN,
Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
OCTOBER 24, 1957

Honorable Dave W. Ling, United States District
Judge Presiding.

This case having been submitted and by the Court
taken under advisement,

It Is Ordered that judgment will be entered for
the defendant and against plaintiff. upon findings to
be submitted under the rules.

[Title of District Court and Cause.]

No. Civil 2078-Phx.

PLAINTIFF'S REQUESTED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Comes Now the plaintiff and requests the court, in
addition to the proposed Findings of Fact Nos. 1 and
2, to make the following Findings of Fact and Con-
clusions of Law:

Findings of Fact

1. That the defendant entered into possession of
the premises under the terms of the lease and erected
structures and buildings upon said premises includ-
ing concrete platforms, footings, swimming pool and
tennis court.

2. That the lease expired on October 27, 1952, and defendant did not remove the structures or concrete platforms, footings, swimming pool or tennis court the defendant had constructed on said premises.

3. That the lease between plaintiff and defendant contained the following provision:

“Para. 12. A joint survey and report of the conditions of the within-described premises has been made and has revealed the property to be unimproved desert land, on which there is no physical improvements, and the lessor agrees to the foregoing statement and hereby relieves the Government of any and all restoration responsibility resulting from the use of such land by the Armed Forces.”

4. That the cost of removing the concrete platforms, footings, swimming pool and tennis court is \$17,500.00 and that by reason of the presence of said platforms, footings, swimming pool and tennis court on said premises said premises have diminished in value in the sum of \$17,500.00 and that by reason of the negligence and tortious acts of defendant in failing to remove said platforms, footings, swimming pool and tennis court that plaintiff has been damaged thereby in the sum of \$17,500.00.

Conclusions of Law

1. The court has jurisdiction of the parties and the subject matter.

2. That under the terms of the lease the defendant is liable to plaintiff for damages to the premises caused by defendant's negligence or tortious acts.

3. That the defendant is liable for the damages to the premises caused by its failure to remove the platforms, footings, swimming pool and tennis court.

4. Plaintiff is entitled to judgment against the defendant in the sum of \$17,500.00 and its costs and disbursements.

Dated this 2nd day of November, 1957.

Respectfully submitted,

GUST, ROSENFELD,
DIVELEBESS & ROBINETTE,

By /s/ FRANK E. FLYNN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 4, 1957.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY

December 12, 1957

Honorable Dave W. Ling, United States District
Judge, Presiding.

Plaintiff's objections to defendant's Proposed
Findings of Fact and Conclusions of Law having

been submitted and taken under advisement, the Court now orders as follows:

Plaintiff's objection to defendant's proposed finding of fact Number 4 is allowed.

Plaintiff's objection to proposed finding of fact Number 7 is allowed; the finding should recite that the original complaint was dismissed because it did not contain a short and plain statement of the grounds upon which the court's jurisdiction depended, as required by Rule 8(a).

The remaining objections are overruled.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having been tried before the Court sitting without a jury and having been submitted to the Court for its decision, and after due consideration the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Plaintiff is a California corporation qualified to do business in the State and District of Arizona, and the Defendant is the sovereign, United States of America.

2. On May 16, 1943, Plaintiff and Defendant entered into a written lease whereby Plaintiff leased to Defendant certain premises owned by Plaintiff and described as :

That part of the West Half ($W1\frac{1}{2}$), Section Thirty-Four (34), Township Two North (T2N), Range Four East (R4E), Gila and Salt River Base and Meridian, lying West of the cross cut canal Except a parcel approximately 150 feet by 150 feet in the Northwest corner thereof, Maricopa County, Arizona, containing approximately 175 acres.

3. Defendant entered into possession of the premises under the terms of the lease, and, as permitted by the lease, Defendant erected buildings and structures.

4. That the lease between Plaintiff and Defendant contained the following provision :

“Para. 12. A joint survey and report of the conditions of the within-described premises has been made and has revealed the property to be unimproved desert land, on which there is no physical improvements, and the lessor agrees to the foregoing statement and hereby relieves the Government of any and all restoration responsibility resulting from the use of such land by the Armed Forces.”

5. The lease expired on October 27, 1952, and the Defendant did not remove the structures and build-

ings placed on the premises by the Defendant during the term of the lease.

6. Plaintiff filed a complaint with this Court on October 5, 1954, claiming damage in the sum of \$40,000, for waste caused by the Defendant's action in failing to remove structures and buildings from the leased premises heretofore described.

7. The complaint was dismissed by the Court because it did not contain a short and plain statement of the grounds upon which the Court's jurisdiction depended, as required by Rule 8(a) Federal Rules of Civil Procedure, but leave to amend was granted, and on October 27, 1955, Plaintiff filed an amended complaint alleging jurisdiction in this Court under Title 28, United States Code, Section 1346(b), and further alleging that the action of the Defendant in failing to remove structures and buildings at the end of the lease from the above-described premises was wrongful and tortious.

Conclusions of Law

1. The lease specifically relieved the Defendant of any duty to remove buildings or structures from the above-described premises.

2. The Court has jurisdiction of the subject matter and the parties.

3. The Plaintiff will take nothing by its amended complaint, and Defendant is entitled to judgment against Plaintiff for its costs and disbursements incurred herein.

Let judgment enter accordingly.

Dated: Dec. 31, 1957.

/s/ DAVE W. LING,
Judge United States District Court for the District
of Arizona.

Lodged December 19, 1957.

[Endorsed]: Filed December 31, 1957.

In the United States District Court
for the District of Arizona

No. Civil 2078—Phx.

M. H. SHERMAN COMPANY, a Corporation,
Plaintiff,
vs.

UNITED STATES OF AMERICA, a Body Politic,
Corporate and Sovereign,
Defendant.

JUDGMENT

The above-captioned matter having been tried by the Court, and Findings of Fact and Conclusions of Law having been made and filed, now therefore, it is

Ordered, Adjudged and Decreed that plaintiff take nothing by its action, and defendant have judg-

ment against plaintiff for its costs reasonably incurred by this action.

Dated December 31, 1957.

/s/ DAVE W. LING,
Judge United States District Court for the District
of Arizona.

Lodged October 31, 1957.

[Endorsed]: Filed December 31, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that M. H. Sherman Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on December 31, 1957.

Dated this 6th day of January, 1958.

GUST, ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ FRANK E. FLYNN,
Attorneys for Plaintiff-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 6, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS

Know All Men by These Presents :

That we, M. H. Sherman Company, a corporation, as Principal, and Fidelity and Deposit Company of Maryland, as Surety, do hereby acknowledge ourselves jointly and severally bound to pay to the United States of America, Defendants, for all costs in the above-entitled suit not to exceed, however, the sum of Two Hundred Fifty (\$250.00) Dollars.

The condition of this Bond is that whereas the Plaintiff corporation has appealed to the Court of Appeals for the Ninth Circuit from the final Judgment entered by this court on December 31, 1957, if said Plaintiff and Appellant shall pay all costs adjudged against it if the appeal is dismissed, or if the Judgment of this court is upheld, then this Bond is to be void; but if the above-named Plaintiff and Appellant shall fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated this 6th day of January, 1958.

M. H. SHERMAN COMPANY,
A Corporation,

By /s/ FRANK E. FLYNN,
One of Their Attorneys.

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,By /s/ C. A. DRUMMOND,
Attorney-in-Fact.

[Endorsed]: Filed January 6, 1958.

In the United States District Court
for the District of Arizona

No. Civ. 2078—Phx.

M. H. SHERMAN COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA, a Body Poli-
tic, Corporate and Sovereign,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Tuesday, September 10, 1957, 10 A.M.

Before: Honorable Dave W. Ling, Judge.

Appearances:

GUST, ROSENFELD, DIVELBESS
& ROBINETTE, ByFRANK E. FLYNN,
Appeared for the Plaintiff.

JACK D. H. HAYS,

United States Attorney, By

WILLIAM A. HOLOHAN,

Appeared for the Defendant.

PROCEEDINGS

The Clerk: Civil No. 2078 Phoenix. M. H. Sherman Company, a Corporation, versus United States of America, Defendant, for trial.

The Court: Are you ready, gentlemen?

Mr. Flynn: Plaintiff is ready.

Mr. Holohan: Defendant is ready.

The Court: You may proceed.

Mr. Flynn: If the Court please, we had some motions in this case some time ago which were argued and decided by the Court. I don't know whether the Court remembers the facts.

The Court: I might recall them if you mentioned them.

Mr. Flynn: This is a suit by the M. H. Sherman Company against the United States.

They entered into a lease, a copy of which will be introduced in evidence. This land out here upon which the Prison Camp was built had a rental of I think around eighty or eighty-five dollars a year.

They constructed these prison buildings out there, with the concrete slabs, swimming pool, tennis court, and so forth, and at the termination of the lease they removed some of the buildings, but they didn't remove the concrete work.

The Court: Yes, I remember that.

Mr. Flynn: And we brought this action for damages as [2*] a result of those slabs being on there.

We have entered into a stipulation with the United States Attorney's office, which has attached to it the certified copy of the lease, and which I think covers all the facts which the plaintiff would be required to prove.

Does the Court want me to read it to him?

The Court: No.

Mr. Flynn: We offer this in evidence.

The Court: All right. It may be received. That is a stipulation, you say?

Mr. Flynn: It is a stipulation, yes.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 1 in evidence.

(Said Stipulation with Certified Copy of Lease attached was received in evidence and marked as Plaintiff's Exhibit No. 1.)

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

PLAINTIFF'S EXHIBIT No. 1

In the United States District Court
for the District of Arizona

No. Civ. 2078—Phx.

M. H. SHERMAN COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA, a Body Poli-
tic, Corporate and Sovereign,
Defendant.

STIPULATION

It is hereby stipulated by and between the parties hereto that the defendant admits the allegations contained in Paragraphs I, III and IV of the Amended Complaint.

It is further stipulated that the attached certified copy of the lease between the parties may be admitted in evidence without any further identification or proof.

It is further stipulated defendant entered into possession of the premises under the terms of said lease and erected structures and buildings upon said premises including concrete platforms, footings, swimming pool and tennis court, and that at the termination of the lease the defendant did not remove said structures or concrete platforms, footings, swimming pool and tennis court.

Plaintiff's Exhibit No. 1—(Continued)

It is further stipulated that the diminution in value of the said premises by the reason of the presence of said concrete platforms, footings, swimming pool and tennis court is the cost of the removal thereof which it is agreed is the sum of Seventeen Thousand Five Hundred Dollars (\$17,500.00).

It is understood that the defendant does not by this Stipulation admit any liability but that such question shall be determined by the court upon the pleadings and evidence including this Stipulation.

Dated this 10th day of September, 1957.

GUST, ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ FRANK E. FLYNN,
Attorneys for Plaintiff.

UNITED STATES ATTORNEY,

By /s/ WILLIAM A. HOLOHAN,
Assistant United States
Attorney.

United States of America
Department of the Army

Washington, 5 September, 1957

I Hereby Certify that the attached documents pertaining to the action entitled: M. H. Sherman

Plaintiff's Exhibit No. 1—(Continued)

Company vs. The United States of America, Civil No. 2078, in the United States District Court for the District of Arizona, Phoenix Division, are true copies of papers on file in the Corps of Engineers.

/s/ J. U. MOORHEAD,

Colonel, Corps of Engineers, Assistant Chief of Engineers for Real Estate.

I Hereby Certify that J. U. Moorhead, Colonel, Corps of Engineers, who signed the foregoing certificate, is the Assistant Chief of Engineers for Real Estate, and that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof I, Wilbur M. Brucker, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and may name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 6th day of September, 1957.

[Seal] /s/ WILBUR M. BRUCKER,
Secretary of the Army.

By /s/ JAMES C. COOK,
Deputy Administrative
Assistant.

Plaintiff's Exhibit No. 1—(Continued)

Lease Between
M. H. Sherman Company
and
The United States of America

[Handwritten]: W2972 Eng. 821.

1. This Lease, made and entered into this Sixteenth (16th) day of May, in the year one thousand nine hundred and forty-three, by and between M. H. Sherman Company, a California Corporation whose address is 3670 Wilshire Blvd., Los Angeles, California, for itself, its successors, and assigns, hereinafter called the Lessor, and The United States of America, hereinafter called the Government:

Witnesseth: The parties hereto for the considerations hereinafter mentioned covenant and agree as follows:

2. The Lessor hereby leases to the Government the following described premises, viz.:

That part of the West Half (W $\frac{1}{2}$) Section Thirty-four (34), Township Two North (T2N), Range Four East (R4E), Gila and Salt River Base and Meridian, lying West of the cross cut canal Except a parcel approximately 150 feet by 150 feet in the Northwest corner thereof, Maricopa County, Arizona, containing approximately 175 acres of unimproved desert land.

The supplies and services to be obtained by this instrument are authorized by, are for the

Plaintiff's Exhibit No. 1—(Continued)
purpose set forth in, and are chargeable to
procurement authority.

Eng. 30068 P332-05 A0905-23

The available balance of which is sufficient to cover
cost of same.

to be used exclusively for the following purposes
(see instruction No. 3):

Requirements of the War Department.

3. To Have and to Hold the said premises with
their appurtenances for the term beginning May 16,
1943, and ending with June 30, 1943.

4. The Government shall not assign this lease
in any event, and shall not sublet the demised prem-
ises except to a desirable tenant, and for a similar
purpose, and will not permit the use of said prem-
ises by anyone other than the Government, such
sublessee, and the agents and servants of the Gov-
ernment, or of such sublessee.

5. This lease may, at the option of the Govern-
ment, be renewed from year to year at a rental of
Eighty-five and no/100 (\$85.00) Dollars, or pro
rata amount for fractional period of use thereof and
otherwise upon the terms and conditions herein
specified, provided notice be given in writing to the
Lessor at least Fifteen (15) days before this lease
or any renewal thereof would otherwise expire:
Provided that no renewal thereof shall extend the
period of occupancy of the premises beyond six

Plaintiff's Exhibit No. 1—(Continued)

months from the date of the termination of the unlimited National Emergency declared by the President of the United States on May 27, 1941. (Proclamation 2487.)

6. The Lessor shall furnish to the Government, during the occupancy of said premises, under the terms of this lease, as part of the rental consideration, the following:

Nothing.

7. The Government shall pay the Lessor for the premises rent at the following rate:

Eighty-Five and no/100 (\$85.00) Dollars per annum, or pro rata amount for a fractional period of use thereof. Finance Officer, U. S. Army, Fort Douglas, Utah, is designated to pay this account.

Payment shall be made at the end of each fiscal year.

8. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures, and erect additions, structures, or signs, in or upon the premises hereby leased (provided such alterations, additions, structures, or signs shall not be detrimental to or inconsistent with the rights granted to other tenants on the property or in the building in which said premises are located); which fixtures, additions, or structures so placed in or upon or attached to the said premises

Plaintiff's Exhibit No. 1—(Continued)

shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, ~~and the Government~~, if required by the Lessor, shall before the expiration of this lease or renewal thereof, restore the premises to the same conditions as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted. Provided, however, that if the Lessor requires such restoration, the Lessor shall give written notice thereof to the Government days before the termination of the lease.

9. The Lessor shall, unless herein specified to the contrary, maintain the said premises in good repair and tenantable condition during the continuance of this lease, except in case of damage arising from the act or the negligence of the Government's agents or employees. For the purpose of so maintaining the premises, the Lessor reserves the right at reasonable times to enter and inspect the premises and to make any necessary repairs thereto.

10. If the said premises be destroyed by fire or other casualty this lease shall immediately terminate. In case of partial destruction or damage, so as to render the premises untenable, either party may terminate the lease by giving written notice to the other within fifteen days thereafter,

Plaintiff's Exhibit No. 1—(Continued)

~~[Indistinguishable] no rent shall accrue to the Lessor after such partial destruction or damage.~~

11. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if the lease be for the general benefit of such corporation or company.

12. A joint survey and inspection of the conditions of the within-described premises has been made and reveals the property to be unimproved desert land, on which there are no physical improvements, and the lessor agrees to the foregoing statement and hereby relieves the Government of any and all restoration responsibility resulting from the use of the subject lands by the Armed Forces.

13. The Government reserves the right to cancel this lease or any renewal thereof by giving thirty (30) days' advance written notice to the Lessor.

Paragraph 8, beginning on line 7 with the words "and the Government" and continuing to end of said paragraph, deleted; paragraphs 9 and 10 deleted; paragraphs 12 and 13 are added, and made a part hereof, prior to execution.)

Map marked Exhibit "A" attached hereto and made a part hereof.

Plaintiff's Exhibit No. 1—(Continued)

In Witness Whereof, the parties hereto have hereunto subscribed their names as of the date first above written.

[Seal] M. H. SHERMAN COMPANY,

By /s/ ARNOLD D. HASKELL,
President, Lessor.

/s/ J. H. RISHEBERGER,
Secretary.

UNITED STATES OF
AMERICA,

By /s/ FRANCIS M. WILKINSON,
Contracting Officer.

In presence of:

/s/ ETHEL L. REDFIELD,
2325 Ocean View Ave.,
Los Angeles, Calif.

(If Lessor is a corporation, the following certificate shall be executed by the secretary or assistant secretary.)

I, J. J. Walsh, certify that I am the Assistant Secretary of the corporation named as Lessor in the attached lease; that Arnold D. Haskell and J. H. Risheberger, who signed said lease on behalf of the Lessor, was then President and Secretary, respectively, of said corporation; that said lease was duly signed for and in behalf of said corporation by

Plaintiff's Exhibit No. 1—(Continued)
authority of its governing body, and is within the
scope of its corporate powers.

[Seal] /s/ J. J. WALSH.

[Stamped]: Division Engineer.
Negotiated Contract.
[Initialed]: J.M.W.

Instructions to Be Observed in Executing Lease

1. This standard form of lease shall be used whenever the Government is the lessee of real property; except that when the total consideration does not exceed \$100 and the term of the lease does not exceed 1 year the use of this form is optional. In all cases where the rental to be paid exceeds \$2,000 per annum the annual rental shall not exceed 15 per centum of the fair market value of the rented premises at the date of lease. Alterations, improvements, and repairs of the rented premises by the Government shall not exceed 25 per centum of the amount of the rent for the first year of the rental term or for the rental term if less than 1 year.

2. The lease shall be dated and the full name and address of the lessor clearly written in paragraph 1.

3. The premises shall be fully described, and, in case of rooms, the floor and room number of each room given. The language inserted at the end of article 2 of the lease should specify only the general

Plaintiff's Exhibit No. 1—(Continued)

nature of the use, that is, "office quarters," "storage space," etc.

4. Whenever the lease is executed by an attorney, agent, or trustee on behalf of the lessor, two authenticated copies of his power of attorney, or other evidence to act on behalf of the lessor, shall accompany the lease.

5. When the lessor is a partnership, the names of the partners composing the firm shall be stated in the body of the lease. The lease shall be signed with the partnership name, followed by the name of the partner signing the same.

6. Where the lessor is a corporation, the lease shall be signed with the corporate name, followed by the signature and title of the officer or other person signing the lease on its behalf, duly attested, and, if requested by the Government, evidence of his authority so to act shall be furnished.

7. Under paragraph 6 of the lease insert necessary facilities to be furnishd, such as heat, light, janitor service, etc.

8. There shall be no deviation from this form without prior authorization by the Director of Procurement, except—

(a) Paragraph 3 may be drafted to cover a monthly tenancy or other period less than a year.

Plaintiff's Exhibit No. 1—(Continued)

(b) In paragraph 5, if a renewal for a specified period other than a year, or for a period optional with the Government is desired, the phrase "from year to year" shall be deleted and proper substitution made. If the right of renewal is not desired or cannot be secured paragraph 5 may be deleted.

(c) Paragraph 6 may be deleted if the owner is not to furnish additional facilities.

(d) If the premises are suitable without alterations, etc., paragraph 8 may be deleted.

(e) Paragraph 9 provides that the lessor shall, "unless herein specified to the contrary, maintain the said premises in good repair, etc." A modification or elimination of this requirement would not therefore be a deviation.

(f) In case the premises consist of unimproved land, paragraph 10 may be deleted.

(g) When executing leases covering premises in foreign countries, departure from the standard form is permissible to the extent necessary to conform to local laws, customs, or practices.

(h) Additional provisions, relating to the particular subject matter mutually agreed upon, may be inserted, if not in conflict with the standard provisions, including a mutual

Plaintiff's Exhibit No. 1—(Continued)
right to terminate the lease upon a stated number of days' notice, but to permit only the lessor so to terminate would be a deviation requiring approval as above provided.

9. When deletions or other alterations are permitted specific notation thereof shall be entered in the blank space following paragraph 11 before signing.

10. If the property leased is located in a State requiring the recording of leases in order to protect the tenant's rights, care should be taken to comply with all such statutory requirements.

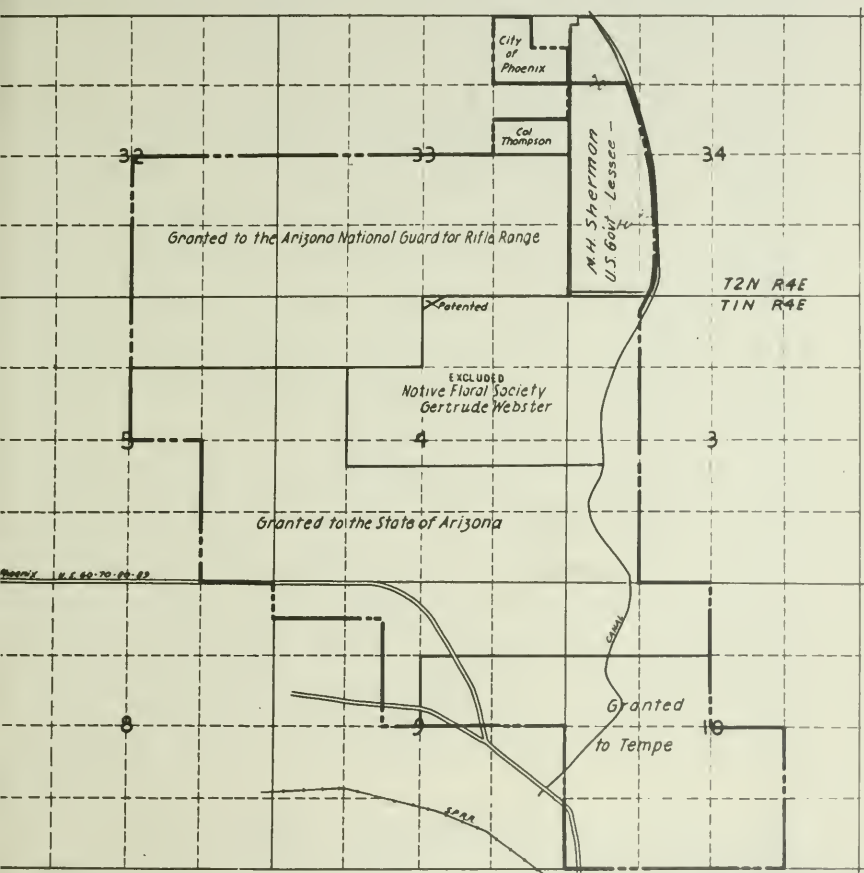
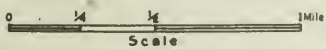


Exhibit "A"



For Base & Meridian

WAR DEPARTMENT
CORPS OF ENGINEERS
SOUTH PACIFIC DIVISION
REAL ESTATE BRANCH
PHOENIX, ARIZONA

PHOENIX CANTONMENT CAMP SITE
PAPAGO PARK
MARICOPA COUNTY, ARIZONA
SEPT. 15, 1942

Plaintiff's Exhibit No. 1—(Continued)

Certified Copy of Resolution

“Resolved, That the President or Vice President, together with the Secretary or Assistant Secretary, be and they hereby are authorized to sign the name of this corporation and to execute for and on behalf of this corporation any and all deeds, mortgages, trust deeds, assignments of Stock Certificates, bonds, bills of exchange, promissory notes, releases of mortgages, assignments of mortgages, requests for reconveyance, contracts for the sale or purchase of real estate or other property, and all other contracts, agreements, leases, indentures and/or evidences of indebtedness that they may deem necessary or proper for the corporation to sign, execute and deliver. The President or Vice President shall have the power to confer the authority hereby given to him on other officers and agents of the corporation as may in his judgment be necessary to facilitate its business. When such authority is conferred on any person by the President, a record thereof shall be made in the Minute Book of the Board of Directors.”

I hereby certify the foregoing to be a true and correct copy of a resolution passed by the Board of Directors of M. H. Sherman Company, at a regular meeting of said Board held on the 22nd day of May, 1935, at the office of the corporation in Los Angeles, California, at which meeting a majority was present and unanimously adopted said resolu-

Plaintiff's Exhibit No. 1—(Continued)

tion. Said resolution is now, and ever since the 22nd day of May, 1935, has been in full force and effect.

I further certify that Arnold D. Haskell is the President and J. H. Risheberger is the Secretary of M. H. Sherman Company.

Date: May 16, 1943.

[Seal] /s/ J. J. WALSH,

Assistant Secretary of
M. H. Sherman Company.

Record Physical Survey of Land and/or Buildings

AR 30-1415

Papago Park, Phoenix, Maricopa Co., Arizona

May 16, 1943

This record to be appended to and made a part of an agreement entered into between the United States of America and the undersigned; owner of the property hereinafter identified.

1. Identity of Property:

That part of the West Half ($W\frac{1}{2}$) Section Thirty-four (34), T2N, R4E, G.&S.R.B.&M, lying West of the cross-cut canal Except a parcel approximately 150' x 150' in the NW corner thereof, Maricopa County, Arizona.

Plaintiff's Exhibit No. 1—(Continued)

2.

Land approx. 17 acres. Total approx. 175 acres

3. Type Building:

Unimproved Desert Land.

4. Fencing:

Amount: Approx. 200'.

Type: Old page fence wire and posts, posts very bad condition.

* * *

7. Remarks:

The land is fairly level.

/s/ PAUL W. TAYLOR,
Officer of Using Agency.

PAUL W. TAYLOR, Major,
Corps of Engineers, Vicinity
Maintenance Engr.

M. H. SHERMAN COMPANY,

/s/ ARNOLD D. HASKELL
Owner or Agent.

/s/ J. H. RISHEBERGER,
5670 Wilshire Blvd.,
Los Angeles, California.

Plaintiff's Exhibit No. 1—(Continued)

Supplemental Agreement to Dispense With
Notice of Renewal

This Supplemental Agreement entered into this twenty-third day of June, 1943, by and between M. H. Sherman Company, a California Corporation, whose address is 3670 Wilshire Blvd., Los Angeles, California, for itself, its successors, and assigns, hereinafter called the Lessor, and the United States of America, hereinafter called the Government,

Witnesseth:

Whereas on May 16, 1943, a lease was entered into between the Lessor and the Government covering

That part of the West Half (W1½) Section Thirty-four (34), Township Two North (T2N), Range Four East (R4E), Gila and Salt River Base and Meridian, lying West of the cross-cut canal Except a parcel approximately 150 feet by 150 feet in the Northwest corner thereof, Maricopa County, Arizona, containing approximately 175 acres of unimproved desert land.

for the period May 16, 1943, to June 30, 1943, with option of renewal annually thereafter, said renewal period being for six months from the date of the termination of the unlimited National Emergency.

Whereas it is desired to amend said lease to dispense with the service of notice of renewal for each fiscal year, as hereinafter provided;

Now, Therefore, the parties hereto do hereby amend said lease in the following respects and in these only:

1. Provisions 3 and 5 are deleted, and there is inserted in lieu thereof the following provision numbered 3, effective July 1, 1943:

“3. To Have and to Hold the said premises with their appurtenances for the term beginning July 1, 1943, through June 30, 1944, provided that, unless and until the Government shall give notice of termination in accordance with provision 13 hereof, this lease shall remain in force thereafter from year to year without further notice; provided further that adequate appropriations are available from year to year for the payment of rentals; and provided further that this lease shall in no event extend beyond six months from the date of the termination of the unlimited National Emergency as declared by the President of the United States on May 27, 1941. (Proclamation 2487.)

In Witness Whereof, the parties hereto have hereunto subscribed their names as of the date first above written.

[Seal] M. H. SHERMAN COMPANY,

By /s/ ARNOLD D. HASKELL,
President.

/s/ J. H. RISHEBERGER,
Secretary.

Plaintiff's Exhibit No. 1—(Continued)

THE UNITED STATES OF
AMERICA,By /s/ FRANCIS M. WILKINSON,
Contracting Officer.

In presence of:

/s/ ETHEL L. REDFIELD,
Witness, 2325 Ocean View
Ave., Los Angeles, Calif.

(If Lessor is a corporation, the following certificate shall be executed by the Secretary or Assistant Secretary.)

I, J. J. Walsh, certify that I am the Assistant Secretary of the corporation named as Lessor in the attached lease; that Arnold D. Haskell & J. H. Risheberger, who signed said lease on behalf of the Lessor, was then President and Secretary, respectively, of said corporation; that said lease was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[Seal] /s/ J. J. WALSH,
92-2655

Admitted in evidence September 10, 1957.

Mr. Flynn: That is our case.

The Court: All right.

Mr. Holohan: The Defendant's case consists of, first of all, the objection to jurisdiction of this Court.

At this time we would like to renew our motion to dismiss the case, based on the jurisdiction, and, further, move for judgment.

The plaintiffs brought their action, first of all, sounding in contract under the Tucker Act, based on the lease, [3] a suit for some \$40,000.00, which was brought in this court.

This Court had no jurisdiction then. The complaint was dismissed, properly so, so that the plaintiff then could bring his action in the Court of Claims.

But there was an Amended Complaint filed in this action which now sounds in tort, or purportedly sounds in tort. Actually, the action consists of waste, and waste, as we know, is not a tort. So that is the second theory we have, on jurisdiction, that it is not a proper action for the tort claim; and, really, our first is that when the Amended Complaint was filed, the two years within which the action could be brought had expired, therefore, this Court had no jurisdiction.

The third basis which we move for judgment on is that the action, on the present action, that by virtue of the lease, which is part of Exhibit 1, there was no duty upon the defendant to remove anything from the property, that then, pursuant to the lease, that we left what we desired on the property, and plaintiff could do with it as they pleased.

The third theory which we are operating on is that prior to entering into possession of the entire tract, the Government condemned some 114 acres of the land, which has been subsequent to, has been part of a Condemnation Action, and that as to any property in the condemnation, if they had any remedy, it would be possibly for restoration damages. [4]

In order to make that a part of the record of this case, I have secured certified copies of the main documents in that condemnation, which I will present to the Clerk and ask for marking for identification.

May this be marked as Government's Exhibit B for identification.

Mr. Flynn: Why don't you offer the whole file? The Court shouldn't have it piecemeal.

Mr. Holohan: All right. I will take counsel's suggestion, then.

This, then, could be marked as Exhibit "A" for identification, consisting of the Declaration of Taking, Complaint, Order for Delivery of Possession, and Judgment of Declaration of Taking, in a case captioned United States of America, Plaintiff, versus 132 Acres of Land, More or Less, in the County of Maricopa, State of Arizona, Arizona Public Service Company, et al., No. Civil 1855 Phoenix.

And this document, finally as Government's Exhibit "B," which is Civil 2682 Phoenix, United States of America versus 76.23 Acres of Land, More or Less; which is a continuation of the same condemnation under different number.

The Clerk: Government's Exhibits "A" and "B" for identification.

(Said Documents were marked as Government's Exhibits "A" and "B" for identification.) [5]

Mr. Holohan: At this time the Government offers the Government's Exhibits "A" and "B"; Government's Exhibit "A" consisting of all certified documents by the Clerk of this Court; and Government's Exhibit "B" consisting of one certified document by the Clerk of this Court.

Mr. Flynn: We want to interpose an objection as to the materiality, on the ground that they are immaterial, and not tending to prove anything within the issues of this case.

On the further ground that it is not a complete record of the case, but only a part of the record of the condemnation case, and, therefore, doesn't give the complete story to the Court; and I don't think we should be put in the position of having to offer something which we do not consider material.

The Court: All right, it may be received subject to your objection.

The Clerk: Government's Exhibits "A" and "B" in evidence.

(Said Certified Copies of documents in cases numbered Civil 1855 and 2682-Phx. were received in evidence and marked as Government's Exhibits "A" and "B," respectively.)

Mr. Holohan: That consists of our evidence in the case, your Honor.

At this time we renew the motion to dismiss for lack of jurisdiction, and the motion for judgment.

The Court: All right.

Mr. Flynn: As part of the record, of course, we move for judgment in the amount stipulated in the stipulation as the measure of damages, in the event the Court should rule that the defendant is liable.

The Court: All right. All these points were pretty well briefed, weren't they?

Mr. Flynn: Yes, most of them were pretty well briefed.

The Court: Do you want to add anything?

Mr. Holohan: Yes, I would desire to file an additional brief, your Honor.

The Court: All right. How much time do you want?

Mr. Holohan: Twenty days.

The Court: Then you may have twenty days.

Mr. Flynn: Yes. Twenty days.

The Court: And ten days to reply.

Mr. Holohan: All right, your Honor. Thank you.

The Court: The Court will stand at recess.

(Which was all of the proceedings had in the above-entitled matter.) [7]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein,

and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 8th day of January, A.D. 1956.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed January 8, 1958, [8]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON
APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court, for the District of Arizona, do hereby certify that I am the custodian of the records of said Court, including the records in the case of M. H. Sherman Company, a corp., Plaintiff, vs. The United States of America, a Body Politic, Corporate and Sovereign, Defendant, numbered Civ-2078 Phoenix, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the originals of said documents filed in said case, and that the attached copies of minute entries and civil docket entries are true and correct copies of

the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Complaint.
2. Motion to Dismiss Complaint.
3. Minute entry of October 10, 1955 (order granting Motion to Dismiss Complaint).
4. Amended Complaint.
5. Motion to Dismiss Amended Complaint.
6. Minute entry of April 13, 1956 (Order denying motion to Dismiss Amended Complaint).
7. Answer to Amended Complaint.
8. Minute entry of September 10, 1957 (Proceedings of trial).
9. Minute entry of October 24, 1957 (Order for judgment).
10. Defendant's Proposed Findings of Fact and Conclusions of Law.
11. Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law.
12. Plaintiff's Requested Findings of Fact and Conclusions of Law.

13. Minute entry of December 12, 1957 (Ruling on objections to proposed findings of fact).

14. Findings of Fact and Conclusions of Law.

15. Judgment.

16. Notice of Appeal.

17. Bond for Costs on Appeal.

18. Designation of Contents of Record on Appeal.

19. Counterdesignation of Contents of Record on Appeal.

20. Reporter's Transcript of Proceedings.

21. Civil Docket Entries.

I further certify that the following original exhibits are transmitted herewith as a part of this record on appeal, as designated, to wit:

Plaintiff's exhibit 1, in evidence.

Government's exhibits A and B, in evidence.

Witness my hand and the seal of said Court this 7th day of February, 1958.

[Seal] /s/ WM. H. LOVELESS,

Clerk.

[Endorsed]: No. 15892. United States Court of Appeals for the Ninth Circuit. M. H. Sherman Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: February 10, 1958.

Docketed: February 19, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15892

M. H. SHERMAN COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY

The Appellant, M. H. Sherman Company, a corporation, will raise and rely upon the following points upon the appeal of this matter:

1. That the provisions of the lease between plaintiff and defendant did not relieve defendant of the duty to remove the concrete structures from the premises at the termination of the lease.

2. That the lease between the plaintiff and defendant gave rise to a duty on the part of defendant to use the property so as not to cause damage or injury to the inheritance.

3. That the failure of defendant to remove the concrete structures at the termination of the lease constituted a tort resulting in damage to the premises.

4. That this action was brought under the tort claims act, Title 28, Sec. 1346(b).

GUST, ROSENFELD, DIVEL-
BESS & ROBINETTE,

By /s/ FRANK E. FLYNN,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 19, 1958.